Safeway, Inc. *and* Rae Huber and United Food and Commercial Workers International Union, Local 4, AFL–CIO, CLC. Case 19–RD–3518

November 20, 2002

DECISION AND CERTIFICATION OF RESULTS

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has considered objections to an election held March 27, 2002, and the hearing officer's report recommending disposition of them.[1] The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows four for and six against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Certification of Results.[2]

The Union has represented the meat and seafood department employees at two of the Employer's grocery stores, located in Missoula, Montana, since at least 1999. The most recent collective-bargaining agreement between the Employer and the Union was effective by its terms from 1999–2002. The Employer's General Working Rules and Regulations, which are applicable to unit employees, include the following confidentiality rule:

> Confidential, restricted or sensitive information must be kept safe and never given to an unauthorized person or organization. Such information includes (but is not limited to) computer-access passwords, procedures used in producing computer or data processing records, personnel and medical records, and payroll data.
>
> Each employee is responsible for preserving the confidentiality of a variety of information that, if released, may lose its value or hurt the Company's competitive position. That includes business and financial information, customer account information, new project and marketing plans, cost data, salary information, personnel information and ad information.

The Employer's General Working Rules and Regulations further provide that violation of the rules will result in discipline up to and including discharge. However, there is no evidence that any employee has been disciplined for violating the confidentiality rule, or that the rule was promulgated in response to employees' union or other protected, concerted activities.

The hearing officer found that the confidentiality rule was overbroad. According to the hearing officer, "although no evidence was introduced, it can be safely assumed" that the terms "payroll data" and "personnel records" include employees' own compensation and working conditions. Because employees have a Section 7 right to discuss their wages and working conditions, the hearing officer effectively concluded that the confidentiality rule reasonably tends to "chill" employees in the exercise of their Section 7 rights. The hearing officer also rejected the Employer's contention that the maintenance of the rule during the critical period was not objectionable because it did not affect the election results. The hearing officer stated that because "employees could reasonably conclude that they would be subject to discipline if they engaged in protected activity violative of the rule, it is reasonable to conclude that the maintenance of the rule could have affected the election results. It may have directly accounted for the Union's margin of defeat."

Contrary to the hearing officer, we find that the maintenance of the confidentiality rule, during the critical period prior to the election, was not objectionable conduct. It is well settled that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). Thus, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, supra, 941 F.2d at 328. Accordingly, "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974). The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence unit employees knew of alleged coercive incident). See generally *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999). For the reasons that follow,

[1] The Report, issued on June 17, 2002, was corrected by errata dated June 19 and 24, 2002.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that union Objections 1, 2, 4, 5, 6, 7, and 9 be overruled.

The hearing officer recommended that the Union's Objections 3 and 8 also be overruled insofar as they allege that the Employer engaged in objectionable conduct by maintaining, in its Code of Business Conduct, rules which allegedly: (1) establish overbroad restrictions on employee communications concerning terms and conditions of employment; and (2) could be read to require employees to participate in investigations of union activity. The hearing officer found that it was irrelevant whether these rules were overbroad, because the uncontroverted evidence shows that the rules did not apply to unit employees and were not disseminated to them. Although the Union has excepted to the hearing officer's conclusion that the maintenance of these rules was not objectionable, the Union has neither excepted to the findings described above nor explained why the maintenance of these rules was objectionable even though, as the record clearly establishes, they were not applicable to unit employees and were not disseminated to them. We adopt the hearing officer's recommendation for the reasons set forth in his report.

we conclude that the Union here has not established that this election must be set aside.

Even assuming, arguendo, that the Employer's confidentiality rule was overbroad, we nevertheless conclude that, under the circumstances of this case, its maintenance by the Employer could not reasonably have affected the results of the election.[3] The Board has found that isolated instances of unlawful threats or interrogations, which were not disseminated to unit employees, did not rise to the level of conduct affecting the election. See, e.g., *Bon Appetit Management Co.*, supra (low-level supervisor asked employee how she was going to vote and threatened to cut her pay if she voted for the union; misconduct was isolated and not disseminated, and election results were lopsided); *Woodbridge Foam Fabricating, Inc.*, 329 NLRB 841, 843, 850–851 (1999) (sole unfair labor practice was undisseminated solicitation of grievances from a single employee by a supervisor). Furthermore, the Board has also recognized that an unfair labor practice which affects the entire unit and was disseminated to all unit employees may nevertheless fall within the *Clark Equipment* "virtually impossible" standard and not be objectionable. See *Wayne County Neighborhood Legal Services*, 333 NLRB No. 15 (2001).[4]

Applying these principles to the facts of this case, we find that the Petitioner has not established that the maintenance of the confidentiality rule could reasonably have affected the election results. Of primary significance in our consideration of this issue is that the employees were represented by the Union at all times material to this case. The Union was in place as the representative of the unit employees since at least 1999, and successfully negotiated at least one collective-bargaining agreement. There is no indication that the confidentiality rule has ever been enforced, or that it has placed any impediment on the ability of employees to discuss terms and conditions of employment with the Union, or with other employees. To the extent that any employee was confused about their statutory right to do so, the Union was ideally placed to advise employees of their rights. There is no evidence that the Union was ever called upon to do so, or that, prior to its decertification, the Union viewed this rule as in any way infringing on employees' Section 7 rights.[5]

We also stress that the confidentiality rule does not expressly prohibit employees from discussing terms and conditions of employment with each other or with the Union.[6] The rule states that various categories of infor-

[3] See *Freund Baking Co.*, 336 NLRB No. 75 (2001). Accordingly, we find it unnecessary to pass on the hearing officer's finding that the rule was overbroad.

In cases where a confidentiality rule has been found to violate Sec. 8(a)(1) in an unfair labor practice case, it is the Board's usual policy to direct a new election if parallel election objections are filed, because "[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962). However, even where an unfair labor practice has been established, the Board has consistently recognized that there is no basis for setting aside an election, because of an unfair labor practice, where "it is virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). Here, there has been no unfair labor practice allegation or finding.

Although we recognize that the "virtually impossible" standard is not applicable in the instant circumstances and that there is not a three-Member majority to overrule it, we note that we do not agree with that standard. Rather, in our view, each case must be evaluated on its particular facts to determine whether, under all of the circumstances, the conduct was such as to preclude a fair election. *Diamond Walnut Growers*, 326 NLRB 28, 32 (1998) (dissenting opinion). In any event, where, as here, there has been no finding by the Board that the conduct constituted an unfair labor practice, the test set forth in *Freund Baking* is the appropriate test. For the reasons set forth below, however, we find that the holding in *Freund Baking* is distinguishable from this case. In these circumstances, we do not pass on whether *Freund Baking* was correctly decided and we note that we did not participate in that case. We further note that this case does not involve any question of restrictions on the right of employees to communicate with a rival union or with the Petitioner. See *NLRB v. The Magnavox Co.*, 415 U.S. 322 (1974).

[4] In *Wayne County*, the Board found that the employer's violation of Sec. 8(a)(2), by continuing to recognize an incumbent union, after a rival union had received more votes in an initial election, was not grounds for setting aside the election. The incumbent union received fewer votes than the rival or the choice of "no union," but a runoff election was required because no choice received a majority of the valid ballots cast. During the period between the initial and runoff elections, the employer continued to recognize the incumbent union, even after the results of the initial election became final, and circulated a letter to all unit employees reaffirming the incumbent's representative status. The Board held that the employer's support for the incumbent could not have aided it in the runoff election because the incumbent was not on the ballot. The Board also concluded that the employer's support for the incumbent was unlikely to have adversely affected employee support for the rival union.

[5] *Freund Baking Co.*, supra, in which the Board found that the maintenance of a confidentiality rule could reasonably have affected the election results, is distinguishable because unlike in this case, there was no incumbent union. *Freund Baking* is also distinguishable because the rule at issue in that case was significantly broader than the rule at issue in this case. The rule stated, in pertinent part, that

> Proprietary information includes all information obtained by employees during the course of their work. This manual, for example, contains proprietary information. . . . You may not disclose or use proprietary or confidential information except as your job requires. Anyone who violates this guideline will be subject to discipline and possible legal recourse.

Furthermore, there was testimony that the employer in *Freund Baking* considered numerous terms and conditions of employment to be proprietary or confidential information. No evidence of that character is present in this case.

[6] Cf. *Super K-Mart*, 330 NLRB 263 (1999) (confidentiality rule, which "does not by its terms prohibit employees from discussing wages or working conditions" did not violate Sec. 8(a)(1)); *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (same). Compare *Iris U.S.A.*, 336 NLRB No. 98, slip op. at 1 (2001) (rule stating that "each employee's personnel records are considered confidential and will normally be available only to the named employee and senior management" violated Sec. 8(a)(1)); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291 (1999) (rule prohibiting employees from revealing "confidential information" regarding customers, fellow employees, or hotel business violated Sec. 8(a)(1)).

mation must be kept confidential. Many of those categories, such as "computer-access passwords," "marketing plans," and "ad information," do not implicate any Section 7 right. Of course, the rule also addresses "personnel records" and "payroll data." However, a finding that this portion of the confidentiality rule had a chilling effect on employees' exercise of their Section 7 rights depends on a chain of inferences upon inferences: that the employees would infer that the reference to personnel and payroll records, in the context of the rest of the rule, referred to their own wages, hours, and working conditions, and that employees would further infer that the ban on disclosure to "unauthorized" persons or organizations encompassed their coworkers and the Union. It is highly improbable that the employees in this unit, who had been represented by the Union for several years, would draw these inferences under the circumstances of this case.

Our dissenting colleague nevertheless asserts that the confidentiality rule could have prevented some employees from approaching the Union, despite its status as the incumbent collective-bargaining representative, and that some employees, despite receiving assurances from the Union, would nevertheless fear that the Employer would unlawfully discipline them for doing so. Our colleague also contends that employees may have been both inhibited by the confidentiality rule from obtaining the full benefits of representation, on the one hand, and then motivated to reject the Union in the decertification election on the other hand, because they viewed the Union as ineffective. We respectfully decline to decide this case on the basis of these unlikely speculations. The fact that the employees were represented by the Union is a material fact in our evaluation of the likely impact of the confidentiality rule on the election results. Combined with all of the other facts in this case, it persuades us that the maintenance of the rule could not reasonably have affected the election results.[7]

For all of the foregoing reasons, we conclude that it is virtually impossible to conclude that the maintenance of the confidentiality rule had any effect on the election results. Accordingly, we overrule union objections 3 and 8 and we shall issue a certification of results.

Because *Iris USA* and *Flamingo Hilton-Laughlin* are distinguishable, we find it unnecessary to pass on whether those cases were correctly decided.

[7] Our dissenting colleague further asserts that the Employer could have expressly included language in its rules advising employees that the rules do not apply to activity protected by Section 7. We do not agree that the Employer's failure to do so establishes that the election must be set aside. Our dissenting colleague also notes that some employers may be reluctant to do so because they would thereby advise employees that they have rights under our Act. Whatever validity this speculation may have in other contexts, if any, there is no evidence that those considerations played any part in the actions of the Employer in this case.

CERTIFICATION OF RESULTS

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Food and Commercial Workers International Union, Local 4, AFL–CIO, CLC, and that it is not the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees working in the meat and seafood departments of the Employer's facilities located at 610 West Broadway and 3801 South Reserve Street, Missoula, Montana, who are handling, cutting, selling, processing, wrapping and preparing fish and fish products, poultry and poultry products, all meat products (fresh, smoked and frozen) that are offered for sale in the Employer's meat departments and meat cases; excluding all other employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. November 20, 2002

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

The Board has found objectionable an employer's mere maintenance of a confidentiality rule that a reasonable employee could interpret as prohibiting the sharing of information about working conditions with co-workers or a union. Sharing such information is protected activity under Section 7 of the Act. See, e.g., *Freund Baking Co.*, 336 NLRB No. 75 (2001); *IRIS U.S.A., Inc.*, 336 NLRB No. 98 (2001). Here, the Employer maintained a confidentiality rule that prohibited, on pain of discharge, disclosure of "business and financial information" including "salary information" and "personnel information," as well as "personnel records" and "payroll data." Consistent with Board precedent, the hearing officer found that the election decertifying the Union must be set aside on this basis. I agree.

My colleagues, in contrast, conclude that even if the confidentiality rule was unlawful, "it is virtually impossible to conclude that the maintenance of the confidentiality rule had any effect on the election results." On their view, because employees were represented by a union, and because the rule did not expressly prohibit discussions among employees or with the Union, no reasonable employee could have been discouraged by the rule from sharing information, frustrating the exercise of free choice. I cannot agree with the majority.[1] The Union's

[1] I agree with my colleagues that the governing standard here is that of *Freund Baking*, supra: whether the challenged rule reasonably

presence may have diminished the likely chilling effect of the confidentiality rule, but we cannot say with confidence that it completely foreclosed a substantial chilling effect.

As the Board has explained with respect to confidentiality rules like the one involved here, the "maintenance of the rule, not its date of promulgation, enforcement, or the effects it had on employees' specific conduct, is what is significant," provided that "employees *could* reasonably have construed the provision as prohibiting them from discussing terms and conditions of employment with other employees, as well as with a union." *Freund Baking*, supra, 336 NLRB No. 75, slip op. at 1 fn. 5 (emphasis in original). See also *IRIS U.S.A.*, supra, 336 NLRB No. 98, slip op. at 1 fn. 4 ("Because employees could reasonably believe that they could be subject to disciplinary consequences if they engaged in Sec. 7 conduct violative of the rule, it is reasonable to conclude that the maintenance of the rule *could have* affected the election results") (emphasis in original).

The majority points to the absence of evidence that the rule has been enforced or that it actually affected employees. Under the Board's precedent, just cited, this clearly is immaterial—at least where employees are not represented by a union. The question, then, is whether the Board's approach should be different when employees *are* represented by a union, as the majority concludes. The majority offers no persuasive reasons for a different approach. It asserts that any employee uncertain of the rule's legality could simply have consulted the Union. That none did so, and that the Union did not challenge the rule prior to decertification, along with the fact that the rule did not *expressly* prohibit employee-to-employee or employee-to-union disclosure, proves to the majority that the rule could not have chilled employees and affected the election.[2]

This reasoning, however, overlooks crucial facts here: that the rule was intended precisely to chill communication, that it plainly covered information involving terms and conditions of employment, and that it made no explicit exception for communication protected by Section 7 of the Act or otherwise acknowledged the Union's role in the workplace.[3] Insofar as it succeeded in impressing the importance of confidentiality on employees, the rule might well have prevented *some* employees, if not others, from approaching the Union for any purpose, including seeking advice on the rule's legality. And even if the Union had advised an employee that the rule could not lawfully be applied to protected activity, that advice would not necessarily have mitigated the rule's effect. As too many employees have learned over the years, the fact that they are represented by the Union, and protected by the Act, is no guarantee that their employer will not discipline or discharge them unlawfully. In the context of this case, the majority's conclusion is especially ironic, since employees who may have been chilled by the confidentiality rule, and thus prevented from obtaining the full benefit of representation, also may have voted to reject the Union that had represented them, presumably because they saw the Union as ineffective.

In short, I see no basis for deviating from the Board's precedent with respect to the maintenance of confidentiality rules like the one here, and I would adopt the hearing officer's report.

Dated, Washington, D.C. November 20, 2002

Wilma B. Liebman, Member

tended to interfere with the employees' freedom of choice in the election. I see no need to respond to the majority's criticism, in what is admittedly dicta, of the "virtually impossible" standard.

[2] The majority asserts that "this case does not involve any question of restrictions on the right of employees to communicate with a rival union or with the Petitioner." But, as I explain, the challenged rule reasonably can be read to impose precisely such restrictions, since it creates no exception for communication with the Petitioner or another union.

[3] Employers who adopt confidentiality rules can quite easily explain to employees that those rules do not apply to activity protected by Section 7. That would mean, of course, advising employees that they have rights under the Act, which some employers may be reluctant to do.